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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1

HARRY BRIDGES,

vs. *Petitioner,*

STATE OF CALIFORNIA.

No. 3

THE TIMES-MIRROR COMPANY AND L. D. HOTCHKISS,

vs. *Petitioners,*

HE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR RESPONDENTS ON REARGUMENT.

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BRIEF FOR RESPONDENTS UPON REARGUMENT.

Preliminary Statement.

The time limit upon this brief and the questions common to both proceedings prompt us to tender a single brief for the above entitled causes. Any matters which are not common to both will be treated separately in the latter portion of this discussion.

THE DETERMINATION OF WHAT SHALL CONSTITUTE A CONTEMPT OF A STATE COURT AND THE MODE AND MEASURE OF PUNISHMENT ARE MATTERS EXCLUSIVELY WITHIN THE DOMAIN OF STATE CONTROL.

The original States, because they never surrendered them, have always had all of the powers of internal sovereignty.

And the newer States, by virtue of the pertinent constitutional provision [1] and its implications, enjoy like status.

Speaking of the State of Florida, the court said in *Skiriotes* v. *Florida*, 313 U. S. 69, 77:

> "Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. Florida was admitted to the Union 'on equal footing with the original States, in all respects whatsoever.' And the power given to Congress by § 3 of Article 4 of the Constitution to admit new States relates only to such States as are equal to each other 'in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.' Coyle v. Smith, 221 U. S. 559, 567, 55 L. ed. 853, 858, 31 S. Ct. 688."

Within this field of State sovereignty are the right and duty to preserve order, protect persons and property and to those ends to establish and maintain courts of justice. What courts the State shall have and how they shall function are matters for State determination. The nature and extent of their implementation in order to function effectively is likewise a State matter.

Gelfert v. *National City Bank*, 313 U. S. 221, 235: " * the Federal Constitution does not prevent the states from determining, on due notice and opportunity to be heard, 'by what process legal rights may be asserted or legal obligations' enforced."

Speaking of injunction against criminal prosecutions under state law, this court said in *Beal* v. *Missouri Pacific R. Corp.*, 312 U. S. 45, 49:

> "The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state

[1] Article IV, Section 3.

courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds.* * *"

And in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 296:

"But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties. See Fox River Paper Co. *v.* Railroad Commission, 274 US 651, 655, 71 L ed 1279, 1283, 47 S Ct 669; Long Sault Development Co. v. Call, 242 US 272, 277, 61 L ed 294, 299, 37 S Ct 79. We are here concerned with power and not with the wisdom of its exercise. We merely hold that in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy."

And Mr. Justice Black, dissenting in the same case, said:

"In addition, I deem it essential to our federal system that the states should be left wholly free to govern within the ambit of their powers. Their deliberate governmental actions should not lightly be declared beyond their powers. For us to shear them of power not denied to them by the federal Constitution would amount to judicial usurpation." (p. 302)

Whether the independence of her courts can and should be best preserved by the slow processes of criminal indictment or by the more expeditious procedure of contempt is for each State to determine.[2] What acts should be over-

[2] *Missouri* v. *Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co.* v. *Snell*, 193 U. S. 30, 36; *Tumey* v. *State of Ohio*, 273 U. S. 510, 534; *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511, 517; *Truax* v. *Corrigan*, 257 U. S. at 373-4, dissenting opinion; *Ex parte Converse*, 137 U. S. 624, 631-3.

looked and what ones punished present questions of policy falling wholly within the State's domain of authority. It was so held in *Patterson* v. *Colorado*, 205 U. S. 454, which involved a contempt of the Supreme Court of Colorado during the pendency of a petition for rehearing. The matter arose on error to the State court and the writ was dismissed for want of Federal jurisdiction. Speaking through Mr. Justice Holmes, the court said at page 459:

> "The foregoing proceedings are set forth in a bill of exceptions, and several errors are alleged. The difficulties with those most pressed is that they raise questions of local law, which are not open to re-examination here."

At page 460:

> "Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the Constitution of the United States. It is admitted that this may be true in some other sense, but it is not true, it is said, for the purpose of fixing the limits of possible contempts. But here again the plaintiff in error confounds the argument as to the common law, or as to what it might be wise and humane to hold, with that concerning the state's constitutional power. If a state should see fit to provide in its Constitution that conduct otherwise amounting to a contempt should be punishable as such if occurring at any time while the court affected retained authority to modify its judgment, the 14th Amendment would not forbid. The only question for this court is the power of the state."

At page 461:

> "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law."

And at page 463:

> "It only remains to add that the plaintiff in error had his day in court and opportunity to be heard. We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States, or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this court."

To the same effect see:

Newport Light Co. v. *City of Newport*, 151 U. S. 527;
Owen v. *Dancy*, 36 F. (2d) 882, 884;
Gasquet v. *Lapeyre*, 242 U. S. 367, 369.

The *Patterson* case has never been overruled or criticized as to this actual holding, although the doubts expressed concerning the absorption of the 1st Amendment by the 14th have been dissolved through later decisions beginning with *Gitlow* v. *New York*, 268 U. S. 652.

The soundness of Mr. Justice Holmes' viewpoint is emphasized by the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, quoted at pages 4 and 5 of Bridges Brief in Opposition to Petition[3] and at pages 32 and 33 of Times Brief in Opposition to Petition.[4]

If there be no right of Federal interference with the execution of the criminal laws of a State (in the absence of violation of the 14th Amendment) and no right to impose a so-called Federal common law upon civil transactions not arising under the Federal Statutes or Constitution, how can it be said that there is some Federal power, whether legislative or judicial, to delimit for the State the scope of contempt of its own courts or the manner of punishing same?

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[3] Hereinafter referred to as first Bridges brief.

[4] Hereinafter referred to as first Times brief.

In the field of contempt law the State is subject, as in criminal and domestic civil matters, only to those Federal limitations imposed upon it by the 14th Amendment, namely, due process and equal protection of the laws. We are presently concerned with due process only, and from that standpoint antiquity of a given process is the hallmark of acceptability, whether the matter be viewed adjectively or substantively. If inherent or reasonable tendency to influence or otherwise interfere with the deliberations of a court in a pending matter was an established criterion of constructive contempt at the time of the adoption of the Federal Constitution, its application today cannot constitute a denial of due process.

THE COMMON LAW OF TWO HUNDRED YEARS DURATION CANNOT BE A DENIAL OF DUE PROCESS.

Inherent or Reasonable Tendency the Historic Standard.

The inherent or reasonable tendency criterion has been established for constructive contempt for a period of two hundred years or more.

The matter is discussed at pages 8-17, 46-49 of Supplemental Brief on Behalf of Respondent in *Bridges* case[5] and at pages 8-18, 45-47 of Supplemental Brief on Behalf of Respondent in *Times* case.[6]

English cases in point and additional to those heretofore cited are the following:

Pool v. *Sacheverel*, 1 P. Wms. 675; 24 Eng. Rep. 565 (1729);

Ex parte Jones, 13 Ves. Jr. 237; 33 Eng. Rep. 283 (1806);

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[5] Hereinafter referred to as Bridges supplemental brief

[6] Hereinafter referred to as Times supplemental brief.

Littler v. *Thomson*, 2 Beavan 129; 48 Eng. Rep. 1129 (1839);
Queen v. *O'Dogherty*, 5 Cox Crim. Law Cases 348 (1848);
Tichborne v. *Tichborne*, 39 L. J. N. S. Ch. 398 (1870);
Rex v. *Parke*, 2 K. B. 432 (1903);
Rex v. *Davies*, 1 K. B. 32 (1906);
Kitcat v. *Sharp*, 52 Law J. N. S. Ch. 134 (1883);
Robson v. *Dodds*, 17 W. R. 782 (1869).

The pertinent language of *Patterson* v. *Colorado*, 205 U. S. 454, is quoted at pages 12-13 Bridges Supp. Brief and pages 12-13 Times Supp. Brief.

The doctrine of that decision was adopted and applied in *Toledo Newspaper Co.* v. *United States*, 246 U. S. at 421. Although this case was overruled by *Nye* v. *United States*, 313 U. S. 33, its repudiation was confined to the procedural phase of the matter, namely, the question of whether constructive contempts can be deemed to have occurred" so near thereto (the court) as to obstruct the administration of justice", it being held that the phrase "so near thereto" has a geographical and not a causal connotation. But the court in the *Nye* case carefully refrained from deciding the questions presented at bar, limited its decision to "a problem of statutory construction, not • • • a question as to the constitutionally permissible scope of the contempt power" (p. 50); and the decision seems to carry an implication that the reasonable tendency phase of the *Toledo* decision, so far as concerns the ingredients of an offense against the court, is sound. We infer this from the following language:

> "If 'so near thereto' be given a causal meaning, then § 268 by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. See Thomas,

> Problems of Contempt of Court (1934) chap. VII. If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a 'reasonable tendency' to 'obstruct the administration of justice' Toledo Newspaper Co. *v.* United States, supra (247 U. S. p. 421, 62 L. ed. 1194, 38 S. Ct. 560) then the conditions which Congress sought to alleviate in 1831 have largely been restored. See Fox, The History of Contempt of Court (1927) chap. IX. The result will be that the offenses which Congress designated as true crimes under § 2 of the Act of March 2, 1931 will be absorbed as contempts wherever they may take place." (p. 49)
>
> "So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential." (p. 52)

The language last quoted could mean but one thing: That the tendency of the communication, not its effect, is the criterion of a constructive contempt. And that the conduct in question amounted to a contempt (though punishable only by indictment) is recognized at page 52 as follows:

> "But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity."

Mr. Justice Stone aptly observed at page 54:

> "* * * and under this statute as the opinion seems to recognize even the proximity to the court, in space, of the contemptuous action, is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances."

Recognition of the tendency rule is also inferable from the fact that *Sinclair* v. *United States*, 279 U. S. 749, was cited in the *Nye* decision (at page 49) with apparent approval.

In that case, a unanimous decision (in which Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo participated), the language of the *Toledo Newspaper Company* case was quoted. And the court applied the tendency test to the facts in determining the existence of a contempt. That was a jury shadowing case which required the decision of two points: (1) whether the offense occurred "so near" to the court as to comply with the Federal statute; and (2) whether, indeed, the jury shadowing amounted to an offense. The court plainly construed and applied the statute in the same manner as the *Nye* case, and it was to that point that it was cited in the latter decision. The court found in the *Sinclair* case that the acts in question occurred in and about the courtroom and were, therefore, within the terms of the statute governing the procedural phase of the matter, namely, the right to summary punishment. The substantive question turned upon the same construction of the Federal statute which Mr. Justice Holmes had advanced in the *Toledo* case:

> "They challenged the sufficiency of the petition to charge anything done in the presence of the court, or near thereto, which obstructed or impeded due administration of justice, or tended so to do." (p. 753.)

> "Council maintain that the petition does not adequately charge and the record fails to show misbehavior by appellants which obstructed the administration of justice within Sec. 268, Judicial Code, since there is neither averment nor evidence that any operative actually approached or communicated with a juror, or attempted so to do, or that any juror was conscious of observation." (p. 762.)

The court's opinion conceded that:

> "The evidence does not disclose that any operative was instructed to approach, or did approach, a juror,

nor does it disclose that any juror actually knew that he was being shadowed. Some were suspicious. The court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed," (p. 758)

but definitely rejected the obstruction principle, saying, at page 762:

"The insistence is that to establish misbehavior within that section it was essential to show some act both known by a juror and probably sufficient to influence his mind. We cannot accept this view. It would destroy the power of courts adequately to protect themselves—to enforce their right of selfpreservation."

The portion of the *Toledo* decision expounding the reasonable tendency doctrine was then quoted with approval, and the court further said, at page 764:

"Under the doctrine so stated, we think the trial judge rightly held it unnecessary to allege or show actual contact between an operative of the detective agency and a juror, or that any juror had knowledge of being observed. The reasonable tendency of the acts done is the proper criterion. Neither actual effect produced upon the juror's mind nor his consciousness of extraneous influence was an essential element of the offense."

and

"The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly, they were not less remote than the publication denounced in Toledo Newspaper Co. *v.* United States. There was probable interference with an appendage of the court while in actual operation; the inevitable tendency was towards evil, the destruction, indeed, of trial by jury." (p. 765)

Here is a clear rejection of the actual obstruction doctrine in favor of the enunciation and application of the

reasonable tendency criterion, and Mr. Justice Holmes and Mr. Justice Brandeis, who had dissented in the *Toledo* case, joined in the ruling.

This case cannot be differentiated, as counsel for petitioners would do, upon the ground that it is not a contempt by publication. Newspapers stand in no different category from other contemners.

Associated Press v. *National Labor Relations Board*, 301 U. S. 103, 133:

> "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of Court."

A criterion which is sufficiently definite for other offenders must be held good for newspapers and labor leaders.

Story on Constitution, Sec. 1884, p. 637:

> "There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the King of England, it could do no wrong, and was free from every inquiry and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer with regard to the rights and duties belonging to governments generally, or to the State governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government."

Inherent or Reasonable Tendency Has Always Been the California Criterion.

This test has prevailed in California throughout its history, both before and after adoption of the 14th Amendment in 1868.

Judge Parsons applied it to a newspaper publication in 1851 (1 Cal. 536, 543); an attempt was made to impeach him and the Legislative Committee concluded that he had applied the law as it existed (1 Cal. 536, 554). A *dictum* of Mr. Justice Field to the same effect appears in *People* v. *Bramigam*, 21 Cal. at 342, decided in 1863.

The California Practice Act, which was adopted in 1851, contained a section (480) reading as follows:

> "The following acts or omissions shall be deemed contempts:
>
> "*First.* Disorderly, contemptuous, or insolent behavior towards the judge whilst holding court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, *tending to interrupt*[7] the due course of a trial, reference, or arbitration, or other judicial proceeding:
>
> "*Second.* A breach of the peace, boisterous conduct, or violent disturbance in presence of the court or its immediate vicinity, *tending to interrupt* the due course of a trial, or other judicial proceeding:
>
> "*Third.* Disobedience or resistance to any lawful writ, order, rule, or process, issued by the court, or judge at chambers:
>
> "*Fourth.* Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness:
>
> "*Fifth.* Rescuing any person or property in the custody of any officer, by virtue of an order of process of such court or judge at chambers." (Vol. 2, *Hittell's Gen. Laws of California* 1850-1864, Title 13, Sec. 5414.)

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[7] All italics ours unless otherwise indicated.

This Act was superseded by the Code of Civil Procedure enacted in 1872 and Sec. 1209 thereof, as initially passed, read as follows:

"The following acts or omissions in respect to a Court of justice, or proceedings therein, are contempts of the authority of the Court:

"1. Disorderly, contemptuous, or insolvent behavior toward the Judge while holding the Court, *tending to interrupt* the due course of a trial or other judicial proceeding;

"2. A breach of the peace, boisterous conduct, or violent disturbance, *tending to interrupt* the due course of a trial or other judicial proceeding;

"3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, Clerk, Sheriff, Coroner, or other person appointed or elected to perform a judicial or ministerial service;

"4. Deceit or abuse of the process of proceedings of the Court by a party to an action or special proceeding;

"5. Disobedience of any lawful judgment, order, or process of the Court;

"6. Assuming to be an officer, attorney, counsel of a Court, and acting as such without authority;

"7. Rescuing any person or property, in the custody of an officer by virtue of an order or process of such Court;

"8. Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from the Court where the action is on the calendar for trial;

"9. *Any other unlawful interference* with the process or proceedings of a Court;

"10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

"11. When summoned as a juror in a Court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such Court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the Court;

"12. Disobedience, by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior Court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer."

The Code Commissioner's note in the 1872 edition indicates that this section was borrowed from the Revised Statutes of Minnesota, Chap. 87. And an examination of the General Statutes of Minnesota (1866), page 570, shows that California's original Sec. 1209 is an exact copy of Sec. 1 of Chap. 87 of the Minnesota Statutes.

Political Code, Sec. 4468, also enacted in 1872, imports the common law into California jurisprudence in the following language:

"*Common law. When rule of decision.* The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution of laws of this state, is the rule of decision in all the courts of this state."

It will be noted that the tendency test was expressly adopted in California as to Subds. 1 and 2 of the statute, both in 1851 and in 1872, and has remained in Sec. 1209 to date; that it was likewise impliedly adopted by Subd. 9 which, through its phrase "any other unlawful interference with the * * * proceedings of a court", incorporated the

existing common law test of unlawful interference which included and connoted inherent or reasonable tendency to influence or otherwise interfere.

It is interesting to observe that, while the influence of the New York Statute of 1829 was strong in bringing about the 1931 Federal enactment (see Thomas on Problems on Contempt of Court, p. 55), it undoubtedly was also the basis of Sec. 166 of the California Penal Code,[8] the 1872 edition of which contains a Code Commissioner's note showing the section to be based on Field's draft of Sec. 201 of the New York Penal Code. California's Sec. 166 is a copy of said Sec. 201 with immaterial variations in Subds. 2, 7 and 8. The Field draft shows that said Sec. 201 was "framed upon the existing provisions of 2 Rev. Stat., 278, Sec. 10, Id., 692, Sec. 14, modified to extend to all courts, instead of to courts of record only." And the footnote on page 67 relating to Subd. 7 contains this:

> "Subd. 7. It has been decided that a publication, pending a suit, reflecting upon the court, the parties, witnesses, jurors or counsel, or intended to prejudice the public mind in regard to the cause, is a contempt. Bayard *v.* Passmore, 3 Leak's Penn., 438; Van Hook's case, 3 City H. Rec., 64; Noah's case, Id., 31: Respublica *v.* Oswald, 1 Dall., 319; Hollingsworth *v.* Duane, Wall., 77, 102."

Said Sec. 2 of the New York Revised Statutes is quoted at pages 528-29 of 28 Col. Law Review.

Whereas the Federal statute made "obstruction" the test, the California Penal Code made "direct tendency" the test. And the codifiers departed entirely from the New York statute in framing the provisions of the Code of Civil Procedure, borrowed it from Minnesota, and incorporated not only "tendency" as a criterion (Subds. 1 and 2) for acts

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[8] Which provides a cumulative remedy so far as it overlaps the field of Sec. 1209 C. C. P. In re Morris, 194 Cal. 63.

which must be actually obstructive under the Federal statute, but also adopted the common law as to contempts generally.

And the California decisions have uniformly held this to be the proper criterion, sometimes referring to Subd. 9 and sometimes stating the matter as one of definition under the inherent power of the court.

Matter of Tyler, 64 Cal. 434, 438 (1884):

> "'Any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning the merits, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt.' (Bishop's Criminal Law, § 216.) It would be strange if, under a government of law, it were otherwise. On the part of an attorney, it is not only a violation of the duty which he owes to the court, but an inexcusably unlawful interference with its proceedings (subs. 3, 9, § 1209, Code Civ. Proc.), directly tending to impair the respect due to its authority. (§ 166, Pen. Code.) As such, the act of the petitioner was punishable not only as a contempt of court, but as an offense against the criminal law."

Ex parte Barry, 85 Cal. 603, 607:

> "The language used was well calculated to intimidate or improperly influence a timid judge, or one unduly sensitive to public feeling or censure.
>
> "It seems to us to be too clear for argument that the publication was made at such a time as to affect or have a tendency to affect the proceeding then pending in court, and this contention of the petitioner cannot prevail. The act complained of was an 'unlawful interference with the proceedings of a court.' and therefore within subdivision 9 of section 1209 of the Code of Civil Procedure. This being so, the citation of other authorities to support the contention of respondent, that the publication of the article was a contempt of court, is unnecessary."

To the same effect are:

In re Shortridge, 99 Cal. 526, 632, 533;
In re Shuler, 210 Cal. at 402;
In re Lindsley, 75 Cal. App. at 124;
Lindsley v. *Superior Court*, 76 Cal. App. at 428;
In re San Francisco Chronicle, 1 Cal. (2d) at 637.

Although it is now firmly established in California that contempt is an inherent power residing in courts created by the State constitution (*e. g.*, Superior Court, Article VI, Sec. 6), a power which cannot be substantially impaired by legislation (Bridges R. 147-8), it should be borne in mind that the state law permits no "summary laying by the heels" of offenders; that its procedure provides for notice and full opportunity to be heard, and that the courts have yielded to the Legislature the right to control all adjective phases of the matter and, indeed, have imposed upon themselves by their own rulings certain limitations upon the scope of the definition of contempt.

That the method of procedure and the quantum of punishment may be fixed by statute is established by *In re Garner*, 179 Cal. 409. So far does this rule go that failure to state in the charging affidavit facts constituting a contempt destroys the jurisdiction (5 Cal. Jur. Sec. 38, p. 938; *Overend* v. *Superior Court*, 131 Cal. 280, 284; *Otis* v. *Superior Court*, 148 Cal. 130).

Proof of the offense must be made beyond a reasonable doubt (R. 47, 173; *In re Buckley*, 69 Cal. 1; *Hotaling* v. *Superior Court*, 191 Cal. 501). And the respondent cannot be compelled to testify (*Ex parte Gould*, 99 Cal. 360; *Hotaling* v. *Superior Court, supra*).

The provisions of Sec. 170 C. C. P. relating to change of judges because of prejudice have been extended by court decision to constructive contempts (*Briggs* v. *Superior Court*, 211 Cal. 619, 630; *Bulcke* v. *Superior Court*, 14 Cal. (2d) 510).

The power does not extend to prohibiting contempts by orders made in advance (*Dailey* v. *Superior Court*, 112 Cal. 94; *In re Shortridge*, 99 Cal. at 530); nor to a mere personal altercation with the judge (*McClatchy* v. *Superior Court*, 119 Cal. 413).

True news accounts of court proceedings cannot be punished (*In re Shortridge*, 99 Cal. 526), nor can publications or other comments which apply to cases which have terminated or to closed phases of a pending case (*In re Shuler*, 210 Cal. at 387).

It is also conceded that the Legislature may enlarge the contempt power (*In re Shortridge*, 99 Cal. at 532; see also 17 C. J. S., Sec. 43, p. 60; 12 Am. Jur., Sec. 49, p. 424; *People* v. *White*, 334 Ill. 465, 484).

But upon the one thing necessary to preserve their independence, *i. e.*, determination of what constitutes the substantive offense of contempt, the courts have held the Legislature to be powerless. And this is the basis for declaring the amendment to Subd. 13 of Sec. 1209 C. C. P. unconstitutional. That amendment was not directed at summary punishment; it sought to exempt publications relating to pending causes from any punishment in any sort of a proceeding.

Inherent or reasonable tendency is also the general American criterion of constructive contempt, as appears from the following encyclopedias and authorities cited therein:

17 C. J. S., Sec. 30 a, pp. 41-42;
12 Am. Jur., Secs. 31-32, pp. 412-13; Sec. 37, p. 417;
6 R. C. L., Secs. 20-21, pp. 508-9.

An inherent tendency, a direct tendency or a reasonable tendency is one and the same thing. Indeed, the Bridges petition concedes inherent tendency and reasonable tendency to be identical tests (Petn. p. 11), as does the Opening Brief at pages 14-15.

Petitioner should be able to advance some overwhelming reason as a basis for urging this Court to reverse the Sinclair ruling and then impose its now concept upon the State of California as the only permissible avenue for protecting the independence of its local courts. Indeed, he should be able to furnish an affirmative answer to the query whether his "present danger" doctrine "is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining* v. *New Jersey*, 211 U. S. at 106).

But no such controlling reason is disclosed. It is conceded inferentially that this new standard of clear and present danger has never found its way into the law of contempt.

> "A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted" (Railroad Com. *v.* Rowan & Nichols Oil Co. 310 U. S. at 580-81).
>
> "Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." (Twining *v.* New Jersey, 211 U. S. at 106-7).

Nye v. *United States Is Not Opposed to Inherent or Reasonable Tendency As the Criterion For State Courts Exercising Inherent Powers.*

The overruling of the *Toledo Newspaper Company* case by *Nye* v. *United States*, 313 U. S. 33, was carefully limited in such manner as to leave our present question open. It dealt only with the effect of the Federal statute which defines the method of procedure for punishment of various

types of contempt and limits those which may be summarily dealt with. Petitioner Bridges' Brief on Reargument concedes that this does not present a constitutional question, saying at page 9:

> "But controversy has raged with regard to the other three categories; in large part whether punishment should take the form of the summary method of contempt or the more protective method of indictment. With that controversy, we shall not concern ourselves, believing that it raises no issue under the federal constitution."

Petitioner Times-Mirror's Brief on Reargument at page 2:

> "We emphasize the circumstance that in violation of the state statute, petitioners were prosecuted summarily and convicted of crimes punishable by imprisonment, not because prosecution by a group of private attorneys, the denial of a jury trial, and the disregard for the legislative declaration of state policy present a federal question, but because this court of recent date has announced its grave concern when 'the vital individual freedoms guaranteed by the First Amendment' are 'partially whittled away' by the courts 'acting without a jury in the exercise of its broad power to punish for contempt'."

The prevailing opinion in the *Nye* case carefully explained that:

> "We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power." (p. 50)

And Mr. Justice Stone's dissent:

> "We are concerned here only with the meaning and application of an act of Congress which has stood unamended on the statute books for one hundred and ten

years. It gives statutory recognition to the power of the federal courts to punish summarily for contempt and provides that that power 'shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice.' (4 Stat. at L. 487, chap. 99, 28 USCA § 385.)

"The issue is not whether this statute has curtailed an authority which federal courts exercised before its enactment. Concededly it has. The only question before us is whether it has so limited that authority as to preclude summary punishment of the contemptuous action of petitioner which it is not denied, is 'misbehavior' although not in the presence of the court, and which it is admitted seriously obstructed the administration of justice in a cause pending in the court." (p. 53)

The significance of this careful limitation of the question under consideration and of the basis for reversal of the *Toledo* case is emphasized by reference to Frankfurter's and Landis' Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harvard Law Review, page 1010, where in footnote 3 the authors say:

"We shall restrict ourselves, likewise, to the constitutional issues involved in the regulation of contempts in the Federal courts. We shall disregard State authorities. They contribute only confusion to an inquiry into the problems raised by the Federal courts. Differences due to differences in constitutional provisions, judicial history and State legislation make resort to State cases treacherous and unscientific. 'The law relating to contempts in the courts of the United States is often lost sight of, if understood, and confused with the law in other jurisdictions, differing in many essential particulars, restricted by legislation and diverse decisions.' In re Perkins, 100 Fed. 950, 952 (E. D. N. C., 1900)."

The *Nye* decision was carefully confined, as was Mr. Justice Holmes' dissent in the *Toledo* case, to a question of statutory construction. "I am not considering whether there was a technical contempt at common law, but whether what was done falls within the words of an act intended and admitted to limit the powers of the courts," said Mr. Justice Holmes (p. 424), and "We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power", says Mr. Justice Douglas (p. 50). Both opinions in the *Nye* case recognize the fact of a contempt, as did Mr. Justice Holmes in the *Toledo* case; the point of divergence was merely the effect of the statutory prescription of method of punishment. In the prevailing *Nye* opinion, it is said at page 52: "But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity"; the quotation from page 50, first hereinabove set forth and the citation without criticism of the *Sinclair* case, seem to amount to a tacit approval of the reasonable tendency criterion.

Indeed, the *Nye* decision is but a reversion to the viewpoint of *Michaelson* v. *United States*, 266 U. S. 42, wherein the validity of the guaranty of jury trial of contempts committed under the Clayton Act was under consideration. Holding it valid, the court said in part at page 65:

> "The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress (Ex parte Robinson, 19 Wall. 505, 510, 511; Bessette *v.* W. B. Conkey Co., 194 U. S. 324, 326) * * *. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character."

Reference to the *Robinson* and *Bessette* cases shows that the court there had in mind the statutory nature of the inferior Federal Courts, a matter which was emphasized in the *Robinson* opinion (86 U. S., at pages 510-11) as follows:

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts and consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2, 1831. 4 Stat. at L. 487. The Act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution may, perhaps, be a matter of doubt, but that it applies to the circuit and district courts there can be no question. These courts were created by Act of Congress. Their powers and duties depend upon the Act calling them into existence, or subsequent Acts extending or limiting their jurisdiction. The Act of 1831 is, therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted."

And the same thought is expressed in footnote 2 of 37 Harvard Law Review, page 1010, as follows:

> "This paper is confined to a discussion of Congressional power over procedure regulating the trial of criminal contempts in the 'inferior Courts,' and puts to one side the power of Congress to regulate or limit the procedure of the Supreme Court. The constitutional differences between the inferior courts and the Supreme Court are decisive in many ways, and they may be operative in the present question. See Ex parte

Robinson, 19 Wall. (U. S.) 505, 510-511 (1873), infra, p. 1028."

Turning again to the *Nye* decision, we find that the cited cases, so far as they discuss the constitutional validity of the 1831 statute, attribute it to the statutory nature of inferior Federal courts and the doctrine that the legislative branch which confers power may limit or withdraw it. The matter is fully discussed in *Ex parte Poulson*, Fed. Cas. No. 11,350 (19 Fed. Cas. at p. 1207). *United States* v. *New Bedford*, Fed. Cas. No. 15,867 (27 Fed. Cas. 91,103); *Re Cuddy*, 131 U. S. 280, 285; and *Eilenbecker* v. *District Court*, 134 U. S. 31, also show the statutory origin of the court to be the basis for upholding the limitation upon the court's contempt power. The other cases cited at page 48 of 313 U. S. do not discuss the particular point.

The matter has never been decided with respect to the Supreme Court of the United States, created by the Constitution. Attempted application of the 1931 Statute to it would present the same problems as an attempted application to the Superior Court or the Supreme Court of California, whose inherent powers are thus defined:

Brydonjack v. *The State Bar of California*, 208 Cal. 439, 442:

> "Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. (In re Garner, 179 Cal. 413 (177 Pac. 162); Nicholl *v.* Koster, 157 Cal. 416 (108 Pac. 302).)"

Millholen v. *Ray L. Riley, Controller, etc.*, 211 Cal. 29, 33:

> "A court set up by the Constitution has within it the power of self-preservation, indeed, the power to re-

> move all obstructions to its successful and convenient operation. This arises from the fact that it is part of and belongs to one of the three independent departments set up by the Constitution, article VI, section 1. This power is recognized, among other places, in sections 47 and 144 of the Code of Civil Procedure. While the above statement is true, there is this qualification thereof, which has been recognized at all times in this state—the legislature may at all times aid the courts and may even regulate their operation so long as their efficiency is not thereby impaired."

These were not contempt cases but they express the doctrine of the decision now under review.

The California Supreme Court has repeatedly said that, although the Legislature may control all procedural aspects of contempt (as shown above), it may not fetter the power itself. The *Nye* decision contains no intimation to the contrary nor any basis for contending that this Court, by adopting a new criterion for constructive contempt, may impose it upon the California courts and pronounce all other standards to be lacking in due process of law.

The Reasonable Tendency Criterion is Not Vague or Indefinite.

Considered As a Statutory Standard.

Considering the sufficiency of this standard independently of its long accepted usage, regard must be had to the settled distinction relating to statutory definitions of offenses against defined activities of the Government, which the court in *Herndon* v. *Lowry*, 301 U. S. 241, 257, quoted with approval from *Gitlow* v. *New York*, 268 U. S. 652, as follows:

> "'. . . when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming

within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

"'It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.' (pp. 670, 671.)"

We have a statutory standard involved in this case, for Sec. 1209 of the California Code of Civil Procedure says:

"The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

* * * * * * *

"8.[9] Any other unlawful interference with the process or proceedings of a court * * *."

This language of itself writes the common law doctrine of reasonable tendency into the statutes of California, but it does not stand alone. See Pol. Code, Sec. 4468 quoted, *supra*.

Thus we have a statutory declaration that publications having an inherent or reasonable tendency to influence or

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[9] Formerly Subd. (9).

otherwise interfere with the proceedings in a pending cause constitute a contempt. Under these circumstances, the *Gitlow* and *Herndon* cases forbid an inquiry into the "question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil", namely, the interference with a court proceeding. If the statutory test be adequate from a constitutional standpoint, the evidence will not be reviewed except for the limited purpose of determining whether, as expressed in the *Milk Wagon Drivers Union* case, the conviction rests upon "insubstantial findings of fact screening reality" (312 U. S. at 293), amounting to "a palpable evasion of the Constitutional guaranty here invoked" (p. 294).

It is folly to say that these statutes do not express the legislative will of California because forsooth Subd. 11 (formerly 13) of Sec. 1209 unconstitutionally sought to immunize contempt by publication unless occurring in the immediate view of the court. This statute has been held unconstitutional ever since 1893 (see *In re Shortridge*, 99 Cal. 526, at 532, and R. 147). The people have effected no change in the Constitution and the Legislature has made no effort to surround the punishment of such contempts by procedural restrictions, such as compulsory jury trial or nominal fine to exclusion of jail sentence. The law of the State is represented by valid enactments and they are found in C. C. P. Sec. 1209, Subd. (8), and Pol. Code, Sec. 4468.

Considered As a Common Law Test.

But if the reasonable tendency criterion be considered independently of the California statutes, it possesses, aside from its ancient lineage, adequate certainty to meet the demands of due process. The phrase "inherent tendency" is, we think, more expressive and definitive, for it connotes those circumstances of time, place and content which determine the presence in a publication (or other interference)

of an internal momentum and direction which will in normal course of events carry it into the judicial deliberations and there disturb, embarrass or otherwise influence the result. This criterion, just like "clear and present danger", is one of proximity and degree, realistic, and not, as opposing counsel suggest, subjective or esoteric.

Herndon v. *Lowry*, 301 U. S. 242, is petitioners' main reliance in their challenge to the intrinsic sufficiency of the reasonable tendency rule. But the case is not opposed to our contentions. Essentially it holds that a statute which, as construed by the State court, does not "deal with a wilful attempt to obstruct a described and defined activity of the government" (p. 256) nor forbid "any specified conduct or utterance of the accused" (p. 261), but leaves it to the jury to create its own standard of guilt, such as "a dangerous tendency", with the object of the tendency undefined except at the whim of the jury—that such a statute furnishes too vague a criterion to convert innocent speech or conduct into a crime. But the case there under consideration was carefully distinguished from those which apply a recognized common law standard as a test of guilt (p. 263), though that standard be one involving a question of degree in its application; and, as above pointed out, that case was also differentiated from those dealing with a statute declaring "that utterances of a certain kind involve such danger of substantive evil that they may be punished", in which event "the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration" (p. 257).

We have heretofore emphasized the fact that the *Herndon* decision recognizes the sufficiency of long recognized common law standards.[10]

In *Nash* v. *United States*, 229 U. S. 373, an indictment under the Sherman Act was challenged on the ground that

[10] Pages 24-26 Bridges first brief; pages 24-26 Times first brief.

the statute was so vague as to be inoperative on its criminal side. The court said in part at pages 376-378:

> "The objection to the criminal operation of the statute is thought to be warranted by The Standard Oil Co. *v.* American Tobacco Co., 221 U. S. 106. Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer sitting in the Circuit Court. Tozer *v.* United States, 52 Fed. Rep. 917, 919.
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> "But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' Commonwealth *v.* Pierce, 138 Massachusetts, 165, 178. Commonwealth *v.* Chance, 174 Massachusetts, 245, 252. The criterion in such cases is to examine whether common social duty would, under the circumstances, have sug-

gested a more circumspect conduct.' 1 East P. C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. See Reg. *v.* Desmond, and other illustrations in Stephen, Dig. Crim. Law, art. 223, 1st ed. p. 146. If he did no more than drive negligently through a street he might get off with manslaughter or less. *Reg.* v. *Swindall*, 2 C. & K. 230; Rex. *v.* Burton, 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See The Germanic, 196 U. S. 589, 596. But without further argument, the case is very nearly disposed of by Waters-Pierce Oil Co. *v.* Texas (No. 1), 212 U. S. 86, 109, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Reasonable Tendency May Be Made a New Statutory Standard of Guilt.

In *Water-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 86, the court had under consideration a state anti-trust law which prohibited combinations for this purpose, among others:

> "1. To create or which may *tend to create* or carry out restrictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this State."

The statute also defined "monopoly" to consist of a combination of two or more corporations when effected in either of the following methods:

> "1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control *tends to create* a trust, as above defined.

"2. When any corporation acquires the shares or certificates of stock, franchise or other rights, or the physical properties or any part thereof of any other corporation for the purpose of preventing or lessening, or where the effect of such acquisition *tends to affect or lessen competition*, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

The court said at pages 108-111:

"It is further insisted that the acts in question are so vague, indefinite and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business, and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation, prosecuted under them, of the nature and character of the acts constituting a violation of the law. These objections are found in the *words of the act of 1899, denouncing contracts and arrangements 'reasonably calculated' to fix and regulate the price of commodities, etc. And in the act of 1903 acts are prohibited which 'tend' to accomplish the prohibited results.* It is insisted that these laws are so indefinite that no one can tell what acts are embraced within their provisions. In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that a criminal statute should be so definite as to enable those included in its terms to know in advance whether the act is criminal or not. * * *

"And also the case of Louisville & Nashville Railway *v.* Commonwealth, 99 Kentucky, 132, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for under such an act it rests with the jury to say whether a rate is reasonable, and makes guilt depend, not upon standards fixed by law, but upon what a jury might think as to the reason-

ableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

"Take the act of 1903, which denounces acts which 'tend' to bring about the prohibited results. It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. In United States *v.* Knight, 156 U. S. 1, this court said: 'Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from a free competition.' This language was quoted with approval in the Addyston Pipe Co. Case, 175 U. S. 237. And in the Northern Securities Case, 193 U. S. 197, while the Sherman Act directly condemned conspiracies and combinations in restraint of trade or monopolizing or attempting to monopolize the same, this court said (page 332):

" 'That to vitiate a combination, such as the act of Congress condemns it need not be shown that the combination in fact results, or will result in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.'

"As to the phrase, 'reasonably calculated', what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished? * * *

"And it is to be remembered that we are dealing with an act of the legislature, sustained in the courts of the State, with reference to its validity in view of the prohibitions of the Federal Constitution against

deprivation by state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the State, the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden."

Fox v. *Washington*, 236 U. S. 273. This case involved the constitutionality of a statute of the State of Washington, reading as follows:

"Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a *tendency* to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall *tend* to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

The statute was held to furnish a sufficiently definite criterion of guilt in the particular case, the court saying, at pp. 277-278:

"Thus by indirection but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure, and the jury so found.

"* * * We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restric-

> tion of liberty and too vague for a criminal law must fail. • • •
>
> "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See Nash *v.* United States, 229 U. S. 373. International Harvester Co. *v.* Kentucky, 234 U. S. 216. It lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it cannot be said to infringe the Constitution of the United States."

The result of these cases is this: The court or jury cannot be left to create at the trial its or their own standard of wrongdoing, but a statutory or other definition of crime is not vague for uncertainty "merely because it throws upon men the risk of rightly estimating a matter of degree;" there must be an uncertainty in the standard itself as distinguished from a mere matter of difficulty in applying the standard to the given facts. "'Drawing the line' is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind" (*Harrison* v. *Schaffner*, 312 U. S. at 583).

These principles have recently been reannounced and applied in *Gorin* v. *United States*, 312 U. S. 19. This case involved the Espionage Act of June 15, 1917, and particularly the sufficiency of an indictment under the language of the Act—"connected with the national defense" and "relating to the national defense." The court said at pages 26-27:

"The sections are not simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense. If this were the language, it would need to be tested by the inquiry as to whether it had double meaning or forced anyone, at his peril, to speculate as to whether certain actions violated the statute. This Court has frequently held criminal laws deemed to violate these tests invalid. United States *v.* Cohen Grocery Co. urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act, that it really punished acts 'detrimental to the public interest when unjust and unreasonable' in a jury's view. In Lanzetta *v.* New Jersey the statute was equally vague. 'Any person not engaged in any lawful occupation, known to be a member of any gang * * *, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is declared to be a gangster. * * *' We there said that the statute 'condemns no act or omission;' that the vagueness is such as to violate due process.

"But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. * * * Finally, we are of the view that the use of the words 'national defense' has given them, as here employed, a well understood connotation."

In footnotes 12 and 13 on page 27 the contrasting decisions on this subject of vagueness are collated. Having found the statute itself sufficient, the court further held that there was no error in leaving to the jury the question of fact whether the information obtained by defendant was connected with or did relate to the national defense. Uncertainty in the standard may be fatal, but mere difficulty in drawing a line in a question of degree has no such effect.

And so it is with contempt of court and the common law standard of reasonable tendency. It is not open to each judge to prescribe his own criterion of what constitutes contempt; he must be governed by the precedents and determine as a matter of law what are the confines of "reasonable tendency;" having done this, he must then apply that standard to the facts of the particular case and the difficulties of determining matters of degree in the application of a reasonably well defined criterion to given facts does not render the statute itself void for vagueness.

PETITIONERS' ATTEMPTS TO DIFFERENTIATE BETWEEN INHERENT TENDENCY AND CLEAR PRESENT DANGER AS APPLIED TO CONSTRUCTIVE CONTEMPTS HAVE PROVED FUTILE.

We have discussed this matter in the first Bridges brief at pages 19-23; Bridges Supplemental Brief pages 18-25; first Times brief pages 42-48; and Times Supplemental Brief pages 18-27.

Opposing counsel now bring forward alternative suggestions involving, as expressed in the Bridges Brief on Reargument, three different types of publications, *viz:*

> "1. Those which actually obstruct judicial proceedings;
>
> "2. Those which while failing to achieve their purpose were intended to obstruct;
>
> "3. Those which neither obstruct, nor were intended to do so, but which were put out under circumstances such that there was a clear and present danger that obstruction would result" (p. 8).

Suggestion No. 3 is but a reiteration of an oft-repeated phrase and, so far as definition goes, we are still left in the dark. Counsel for neither petitioner do anything better

in the way of differentiating present danger from inherent tendency than to suggest that the former has an accentuated tendency, a greater degree of nearness to success. This would still leave us with a criterion depending upon factual questions of proximity and degree upon which the finding of the State courts would be conclusive except in instances of complete absence of evidence warranting the drawing by reasonable men of the inferences adopted by the trial judge.

The Actual Obstruction Test Has Been Repeatedly Rejected.

Mr. Justice Holmes did so in the *Schenck* case, where the clear and present danger doctrine was first announced. He said at page 52 of 249 U. S.:

> "If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime."

As we have elsewhere shown, this was the definite ruling of *Sinclair* v. *United States*, 279 U. S. 749, and of *Gitlow* v. *New York*, 268 U. S. 652.

The English cases are to the same effect. See *Rex* v. *Tibbits*, L. R. (1902), 1 K. B. 77, 85-89; *Charlton's* Case, 2 My. & Cr. 316, 342, 40 Eng. Rep. 661, 671 (1837); and *Skipworth's* Case, L. R., 9 Q. B. 230, 235-238 (1873).

Oswald on Contempt of Court, citing English cases, says at page 93:

> "The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."

Sinclair v. *United States*, 279 U. S. at 764:

> "The reasonable tendency of the acts done is the proper criterion. Neither actual effect produced upon

the juror's mind nor his consciousness of extraneous influence was an essential element of the offense."

In re San Francisco Chronicle, 1 Cal. (2d) 630, at 637:

> "It is also entirely immaterial that the article did not in fact influence the court, so long as the publication tended to obstruct justice. (In re Shuler, supra; In re Lindsley, supra; United States *v.* Toledo Newspaper Co., 220 Fed. 458, affirmed 247 U. S. 402 (38 Sup. Ct. 560, 62 L. ed. 1186); Ray *v.* State, 186 Ind. 396 (114 N. E. 866).) The article necessarily tended to arouse a state of mind in the general public and to influence public opinion, in such a way as to embarrass the court in the determination of the cause. In this respect, it has the same effect as one which directly attempts to arouse sympathy in favor of one side of the case."

The distinction between tendency to influence and fact of influence is so evanescent as often to be indiscernible. The court in the *San Francisco Chronicle* case quoted with approval from *People* v. *Wilson*, 64 Ill. 195, as follows:

> " 'A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven in the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.' "

Judge Wilson further explained the impossibility of recognizing the "actual obstruction" doctrine when he said at R. 108 of No. 64:

"If the courts are not permitted to try cases and render judgments impartially and without pressure either from newspapers, individuals, or groups of individuals, freedom of speech and freedom of publication will soon pass into oblivion. If a newspaper may suggest how a case should be determined, any person or group has the same right to suggest its ideas to the judge. Lawsuits would then be decided, not according to the weight of the evidence, but according to the weight of the influence brought to bear upon the judge, and the newspaper itself would be the victim if it had less influence than the opposing group."

See similar remarks of Supreme Court at R. 132 of *Times* case.

Intent Without Success.

In California, as elsewhere, it is well established that intent is not of the essence of a contempt of court; it goes to the magnitude of the offense and is not an indispensable ingredient.

In re San Francisco Chronicle, 1 Cal. (2d) 630, at 635:

"The position of respondents is that their mere statement under oath, that they acted in good faith purges them of the alleged contempt. Similar is their contention that the proceeding is quasi criminal in character, and that the essential element of criminal intent is negatived by their sworn denial. It would indeed be a remarkable rule that in criminal prosecutions the sworn conclusion of the defendant that he meant no wrong would conclusively establish his innocence, *in spite of his frank admission that he knowingly did the act complained of*. There is no such rule in criminal prosecutions, and in proceedings for contempt this view has been repudiated by the great majority of American jurisdictions. The majority rule above referred to is especially applicable when, as here, the publication is not susceptible of two interpretations. (Citing cases.)"

To the same effect, see:

Ex Parte Creely, 8 Cal. App. at 719-20;
In re Independent Pub. Co., 228 Fed. 789.

The court in *Abrams* v. *United States*, 250 U. S. 616, 621, an espionage case, said:

> "It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."

And Mr. Justice Holmes in his dissent said (page 626):

> "I am aware, of course, that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not."

Abstract intent is wholly innocuous and amounts to naught except as translated into action, so this suggested criterion of "intent without successful consummation" automatically identifies itself with the actual obstruction test or the clear and present danger and of its own weight thus drops out of the discussion.

The Charge and the Findings in Each Case.

Bridges Proceedings.

The specific charge is found at R. 4 and the court's finding and conclusions at R. 52.

The California Supreme Court's summarization of the effect of the published portions of the telegram is found at R. 156. At R. 160 emphasis is given to the fact that "it was the publication of the telegram in the manner hereinbefore set forth, and not the sending of it, that constituted the offense of which he was found guilty."

Times-Mirror and Hotchkiss Case.

"Sit-Strikers Convicted"—First Count. The charge is set forth at R. 12 in paragraph V; the finding at R. 60 in paragraphs 1 and 4; and the Supreme Court's discussion of this editorial at R. 127-28.

"The Fall of an Ex-Queen"—Third Count. The exact charge appears at R. 18, paragraph V, and the finding at R. 60, paragraph 1; the Supreme Court's appraisal at R. 128-130.

"Probation for Gorillas"—Fifth Count. The charge is set forth at R. 24, paragraph V, and the finding at R. 60, paragraph 1; Supreme Court appraisal at R. 130-134.

THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE CONVICTION IS NOT OPEN TO REVIEW HERE.

This matter is discussed at pages 50 to 54 of our Bridges supplemental brief and at pages 49-52 of Times Supplemental Brief; we invite renewed attention thereto. And we offer the following additional observations:

The rule of *Aetna Life Ins. Co.* v. *Duncan*, 266 U. S. 389, concerning review of the evidence by this Court was reiterated in *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 143, the court adding:

> "We make that analysis, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier

> of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits."

Mr. Justice Holmes, applying this thought to the review of a State contempt proceeding, said in *Patterson* v. *Colorado*, 205 U. S. at 460:

> "It is argued that the articles did not constitute a contempt. * * * However, it is enough for us to say that they are far from showing that innocent conduct has been laid hold of *as an arbitrary pretense for an arbitrary punishment.* Supposing that such a case would give the plaintiff in error a standing here, *anything short of that is for the state court to decide. What constitutes contempt*, as well as the time during which it may be committed, *is a matter of local law.*"

And the same thought was expressed in the *Milk Wagon Drivers Union* case, 312 U. S. at 294, as follows:

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights."

The evidence is reviewed, however, at pages 55-82 of the Bridges Supplemental Brief, and at pages 12-30 of the first Times brief.

A JUDICIAL CONVICTION OF ABUSE OF A LIBERTY IS NOT THE EQUIVALENT OF A STATUTE FORBIDDING ITS LEGITIMATE EXERCISE.

Petitioner Bridges contends [and petitioner Times-Mirror apparently also contends] that the judgment in an individual case convicting one of an abuse of the right of free speech is on a parity with a statute or ordinance forbidding legitimate exercise of that fundamental right. The argument is manifestly unsound, and this was pointed out by Mr. Justice Hughes in *Near* v. *State of Minnesota*, 283 U. S. 697, 720, when he said:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

Mr. Justice Frankfurter in the *Milk Wagon Drivers Union* case (312 U. S. 287, 297), and in *American Federation of Labor* v. *Swing*, (312 U. S. 321) emphasized the difference between previous restraint of lawful speech and court control before or after the event of abuses of that right. In the former case he said:

> "We do not qualify the Thornhill and Carlson decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. Cantwell *v.* Connecticut, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A. L. R. 1352; American Federation of Labor *v.* Swing, No. 56 this term, this day decided (— U. S. —, post, 513, 61 S. Ct. —). But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, Thornhill *v.* Ala-

bama, 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736, supra, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the Thornhill opinion excluded from its scope."

This distinction, so plain but so consistently ignored by petitioners, serves to differentiate from the case at bar most of the authorities upon which respective counsel rely. There is nothing in the law of constructive contempt which bears the complexion of previous restraint or subsequent punishment of such a nature as to amount to a practical previous restraint, for it is only those acts or utterances which have a reasonable tendency to interfere with the court proceeding which are ever punishable. It would be as logical to say that the laws punishing for libel, slander, sedition and the like are unlawful restraints of free speech. Yet those laws furnish an ever-present "overhanging and undefined threat" just as much as do the laws of negligence, restraint of trade or constructive contempt of court, for in each instance the violation depends upon a correct judging of matters of proximity and degree by a layman.

DECISIONS RENDERED AT LAST TERM OF THIS COURT POINT UNMISTAKABLY TO AN AFFIRMANCE HEREIN.

The cases decided at the October 1940 term have marked out a clear pathway for a correct solution of this case. The starting point for the discussion is furnished by *Cox* v. *New Hampshire*, 312 U. S. 569, wherein a group of Jehovah's Witnesses, members of the sect whose right to free expression had been upheld in *Cantwell* v. *Connecticut*, 310 U. S. 296, were denied the right to employ an unlicensed parade as the vehicle for expressing their views, although they were ministers of the particular sect, engaged in "an informa-

tion march", carrying signs and placards and handing out printed leaflets announcing a meeting of the Witnesses, and although no breach of the peace occurred or was in fact threatened. At page 574 Mr. Chief Justice Hughes said:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is *designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.* One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is *a traditional exercise of control by local government*, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

We find here not a word about clear and present danger for the court is dealing with one of the long recognized and normal functions of government, exercised immemorially, side by side with fundamental liberties and only indirectly or incidentally in restraint of the same.

The court stressed the fact that the ordinance was not aimed at the restriction of speech or worship and affected same only as an incident to accomplishing some other legitimate governmental purpose, at which point freedom of speech must yield.

It adverted to the State court's construction of the statute and the significance of the facts that "the statute prescribed 'no measures for controlling or suppressing the publication on the highways of facts and opinions, either by speech or by writing;' that communication 'by the distribution of literature or by the display of placards and signs' was in no respect regulated by the statute; that the regulation with respect to parades and processions was applicable only 'to organized formations of persons using the highways;' and that 'the defendants, separately, or collectively in groups not constituting a parade or procession,' were 'under no contemplation of the Act' " (p. 575); and further remarked: "In this light, the court thought that interference with liberty of speech and writing seemed slight" (p. 575); and "It was with this view of the limited objective of the statute that the State court considered and defined the duty of the licensing authority and the rights of the appellants to a license for their parade, with regard only to considerations of time, place and manner so as to conserve the public convenience" (p. 575-6).

The quoted language, coupled with the review of such cases as *Lovell* v. *Griffin, Hague* v. *Committee, etc.* at pages 577-8, discloses that laws which are designed for the protection of the public as a whole, though they cover so relatively unimportant a matter as avoidance of traffic congestion on the public streets, are not invalid merely because they limit incidentally or indirectly the exercise of one of the fundamental liberties; that in those instances where the legislation is not aimed at the restriction of free speech,

freedom of worship or the like, those rights must yield *pro tanto* in the process of balancing "felt necessities" of society against individual rights; but that legislation or court action *directed at* the suppression of lawful exercise of free speech or religion is unlawful unless it can be shown to be necessary in order to prevent "some substantive evil which the State constitutionally may seek to prevent". Again we quote the Cox decision:

> "The statute, as the state court said, is not aimed at any restraint of freedom of speech, and there is no basis for an assumption that it would be applied so as to prevent peaceful picketing as described in the cases cited.
>
> "The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions." (p. 578)

As the parade ordinance of the *Cox* case was not directed at free speech or freedom of worship, it was upheld; likewise the flag salute requirement of the State of Pennsylvania which was upheld in *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586, and the injunction in the *Milk Drivers* case which was sustained in 312 U. S. 287. In the last mentioned case it was held that, while peaceful picketing cannot be enjoined because it is a form of freedom of expression (*American Federation of Labor* v. *Swing*, 312 U. S. 321), that basic right cannot be made the vehicle for accomplishing admitted wrongs.

When speech takes the form of epithets or personal abuse, it ceases to be in any proper sense a communication of information or opinion safeguarded by the Constitution (*Cantwell* v. *Connecticut*, 310 U. S. at 310), or if it takes the form of defamation, it is subpect to the laws of libel (*Near* v. *Minnesota*, 283 U. S. at 715). When accompanied by explosive

or stench bombs, window breaking, arson and other forms of violence, it ceases to be free speech and becomes a breach of the peace, a wrong whose continuance can be properly prevented by injunction, as held in the *Milk Drivers* case. Free speech as such cannot be suppressed by statute or by court decree. But it must be exercised within its own orbit, subject to the limitations imposed by other laws designed to accomplish permissible ends, whether it be keeping the streets clean and open or the maintenance of the independence of the courts of the land.

Other recognitions of the distinction between direct and incidental restrictions of speech or other fundamental liberties are found in:

Schneider v. *State*, 308 U. S. 147, 160-6;
Carlson v. *California*, 310 U. S. 106, 112;
Cantwell v. *Conn.*, 310 U. S. 296, 304-5, 308-9;
Grosjean v. *American Press Co.*, 297 U. S. 233, 250;
Associated Press v. *Natl. Labor Rel. Bd.*, 301 U. S. 103.

In no instance has the standard of guilt been invalidated as unconstitutional because of its restriction of the basic liberties where that standard constituted a part of a law of general application and operated only incidentally to hold the exercise of the right of speech, religion, assembly or petition within those bounds which are implicit in the concept of "ordered liberty".

A review of the recent decisions will disclose that in the main the statutes or ordinances which were invalidated involved express prohibition of free speech or, through an arbitrary licensing system, sought to accomplish the same end. This is true of *Lovell* v. *Griffin*, 303 U. S. 444, a handbill case; *Hague* v. *C.I.O.*, 307 U. S. 496, a public assemblage controversy; *Schneider* v. *Irvington*, 308 U. S. 147, another series of handbill cases; *Thornhill* v. *Alabama*, 310 U. S. 88, an anti-picketing ordinance; *Carlson* v. *California*, 310 U. S.

106, another anti-picketing ordinance; *Cantwell* v. *Connecticut*, 310 U. S. 296, as to Count Three which dealt with a licensing ordinance held to be directly restrictive of freedom of speech and religion.

The characterization of the *Thornhill* and *Carlson* cases in the *Milk Wagon Drivers Union* decision (312 U. S. at 297) applies to all of those which we have just mentioned:

> "They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down."

This also applies to *Stromberg* v. *California*, 283 U. S. 359.

Other instances in which legislation has been stricken are those wherein the prescribed standard of guilt was too vague, namely, *Herndon* v. *Lowry*, 301 U. S. 242; *Lanzetta* v. *New Jersey*, 306 U. S. 451; and *Cantwell* v. *Connecticut*, 310 U. S. 296, as to the Fifth Count of information.

In *De Jonge* v. *Oregon*, 299 U. S. 353, the Syndicalism Statute of that State, though valid on its face, was held to be unconstitutional because of the construction placed upon it by the Supreme Court. This is also true of the *Herndon* case.

On the other hand, direct restrictions upon freedom of speech or religion were upheld because of their relation to the needs of organized society in *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Schenck* v. *United States*, 249 U. S. 47; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616; *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 373; *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287.

It seems plain, though the Bill of Rights constitutes a firm defense against direct infringements upon the right of

free speech where those infringements are the sole or major end of the legislation, nevertheless the liberty must yield to the demands of the body politic when legislation directed to other legitimate ends affects these fundamental rights but incidentally.

No Procedural Questions Are Involved in Either Case.

The determination of these causes should not be embarrassed by any considerations of adjective law, such as the controversy over inherency of power to punish summarily for constructive contempt. Indeed, there was nothing resembling summary procedure in either case.

The course of the Bridges litigation through the State courts extended from February 24, 1938, to October 16, 1939, and is described at page 7 of respondent's first Bridges brief. True, there was a denial of jury trial, but no point is now made of that (Petn. p. 9), nor could one be successfully advanced (*Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36; see admission in footnote 3 on page 4 of Reply Brief). Perhaps petitioner's attitude is influenced by the fact that Judge Bishop was chosen by stipulation after petitioner had challenged Judge Schmidt (R. 141).

As appears from pages 1-5 of the first Times brief, that cause was initiated on June 3, 1938, and terminated in the California courts on February 29, 1940. No jury trial was demanded; a demurrer was interposed which was argued for seven days; the case was tried on oral evidence; it was argued in the Supreme Court of California, held under submission for approximately a year, and then reargued and decided against petitioner.

In both cases all questions, such as arguments based upon Sir John Fox's criticism of the procedural phases of *Rex* v. *Almon*, have been waived. There cannot be found in either proceeding the slightest vestige of the error of that doctrine as expounded in *Nye* v. *United States*. There are no

questions here except those involving substantive law. Review upon certiorari is confined to the points raised in the petition.[11]

Subd. 13 of Sec. 1209 California Code of Civil Procedure Is Concededly Unconstitutional.

Although counsel in both cases discuss it as if it were the expression of the legislative policy of California, they concede that Subd. 13 of Sec. 1209 C.C.P. has been repeatedly declared unconstitutional, and they also confess that a State court decision declaring a State statute unconstitutional raises no Federal question, as indeed they must. First declared unconstitutional in 1893 (*In re Shortridge*, 99 Cal. 535), the people have effected no change in the Constitution and the Legislature has made no effort to surround the punishment of such contempts by procedural restrictions, such as jury trial, nominal fine to exclusion of jail sentence, etc. Subd. 13 has the same place in California jurisprudence as if it had never been enacted.

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[11] *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 604-5; *State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Washington, etc. Co.* v. *National L. Rel. Bd.*, 301 U. S. 142, 146.